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No. 82-481

In the Supreme Court of the United States

OCTOBER TERM, 1982

COTTON BELT INSURANCE CO., INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether notice to a surety that the defendant has failed to appear is constitutionally required before the surety's bond may be forfeited.

2. Whether federal bail bonds must be interpreted in accordance with the law of the state in which they are written.

3. Whether a due process requirement of direct notice to the surety of an increase in the risk that the defendant may flee applies to situations where the defendant has already fled.

4. Whether Fed. R. Crim. P. 46 is unconstitutional because it requires sureties to enter into adhesion contracts or because it is unconstitutionally vague.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A2-A6) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on June 17, 1982. The petition for a writ of certiorari was filed on September 14, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

On September 25, 1979, defendant David Dix failed to appear in the United States District Court for the Central District of California for trial. The court therefore forfeited a $25,000 bond written by petitioner, Cotton Belt Insurance Co., Inc. Arthur Biagas, charged in a different proceeding in the same district, failed to appear for a pre-trial status

hearing on December 10, 1979. The district court accordingly ordered forfeiture of a $4,000 bond, also written by petitioner. On September 30, 1980, petitioner moved to vacate both forfeitures (E.R. 1-2, 46-47).[1] The district court denied petitioner's motions (E.R. 35, 85) and the court of appeals affirmed (Pet. App. A2-A6).

1. On March 13, 1979, defendant Arthur Biagas was arrested on a complaint charging sale, conveyance and disposition of a stolen Treasury check, in violation of 18 U.S.C. 641.[2] At arraignment Biagas was released on his own recognizance. Biagas was subsequently indicted on three counts of possession of stolen mail, in violation of 18 U.S.C. 1708, and was again released on his own recognizance. After he failed to appear for a status hearing in April 1979, a bench warrant was issued. Biagas was arrested in June 1979 in the Northern District of California, at which time he posted a $1,000 cash bond to secure his release. Biagas again failed to appear at another proceeding scheduled in July 1979 in the Central District of California. The magistrate ordered another warrant, raised the bail to $4,000, and forfeited the $1,000 cash bond. That warrant was executed in August 1979. In August or September 1979 Biagas posted a $4,000 corporate surety bond written by petitioner. Biagas failed to appear at a status hearing in December 1979, at which time counsel informed the court that he did not know where Biagas was. The district court accordingly ordered another warrant and forfeited the $4,000 bond. The warrant was executed in February 1980, upon Biagas' voluntary surrender. Biagas pleaded guilty shortly thereafter to one count of the indictment.

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[1]"E.R." refers to the excerpt of record filed in the court of appeals.

[2]The details of Biagas' and Dix's arrest and prosecution are derived from the government's brief in the court of appeals.

Defendant David Dix was arrested in July 1979 and filed two corporate surety bonds for $25,000 each.[3] On August 1, 1979, Dix was indicted on two counts of unlawful possession and sale of narcotics, in violation of 21 U.S.C. 841(a)(1). Bail was continued and the trial date was set for late September 1979. Defendant failed to appear on that date. The district court accordingly issued a bench warrant and ordered forfeiture of the two $25,000 bonds (Pet. 4; Pet. App. A3).

2. On September 30, 1980, petitioner moved to vacate both forfeitures (E.R. 1-2, 46-47). In identical affidavits filed with the motions, petitioner's agents admitted posting the forfeited bonds, but stated that until September 10, 1980, they had no notice or knowledge that the defendants had breached the terms of their bonds. The agents added that the breaches were without their "knowledge, consent, connivance or collusion" (E.R. 3-6, 48-51). Petitioner urged that notice of the defendants' failure to appear is necessary to give the surety an opportunity to find and return them in order to take advantage of the exoneration provisions in Rule 46, Fed. R. Crim. P. Petitioner further contended that California law, which provides for such notice, should be "applied as a guide, not * * * interpreted as part of the bail contract, but * * * implied as a guide as to what is reasonable notice" (Biagas Tr. 4, 11; see also Dix Tr. 4).[4]

The district court rejected petitioner's arguments, noting that the purpose of bail is to insure the defendant's appearance as ordered, not to provide for private bounty hunters (Biagas Tr. 10). The court stated that when petitioner writes a bond without "tak[ing] an awfully good look at the kind of person they are dealing with" and without subjecting the

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[3]Only one of the bonds was posted by petitioner.

[4]"Biagas Tr." and "Dix Tr." refer to the transcripts of the separate hearings on petitioner's motions to vacate the forfeitures.

defendant himself to any personal financial risks from flight, the effectiveness of bail is significantly reduced (Biagas Tr. 8-9; Dix Tr. 5). The court of appeals, on similar grounds, subsequently affirmed the district court's denial of petitioner's motions (Pet. App. A2-A6).

ARGUMENT

Fed. R. Crim. P. 46 governs the forfeiture procedures for federal bail bonds. By entering into a bond, the "obligors submit to the jurisdiction of the district court and irrevocably appoint the clerk of the court as their agent upon whom any papers affecting their liability may be served" (Rule 46(e)(3)). If there is a breach of a condition of the bond, "the district court shall declare a forfeiture of the bail" (Rule 46(e)(1)). Entry of judgment on the forfeiture is made by motion of the court (Rule 46(e)(3)). Prior to entry of such judgment, however, the "motion and such notice of the motion as the court prescribes" are served on the clerk of the court, "who shall forthwith mail copies to the obligors to their last known addresses" (*ibid.*). Even after entry of judgment, the forfeiture may nevertheless be remitted "if it appears that justice does not require the enforcement of the forfeiture" (Rule 46(e)(2), (4)).

Thus, Rule 46 sets forth in unambiguous detail the procedures to be followed in declaring and enforcing a forfeiture. It plainly provides for pre-judgment notice to the obligor as well as post-judgment remission as the needs of justice require, and just as plainly does not call for notice prior to the essentially ministerial act of declaring a forfeiture. Therefore, contrary to the assertions of petitioner, there is no need to refer to state law as an "aid" in interpreting the provisions of Rule 46, nor does the rule deny petitioner due process. The issues raised by petitioner clearly do not merit the attention of this Court.

1. Petitioner contends (Pet. 10-12) that forfeiture of bail without direct notice to the surety of the principal's breach violates due process. The court of appeals properly rejected this claim. The Constitution does not require that those who breach a contract be given an opportunity to remedy the breach. The requirements of due process, furthermore, are fully met here. The obligor on the bond is not deprived of any property by the declaration of a forfeiture under Rule 46(e)(1), but only by the subsequent entry of a judgment under subsection (e)(3). The latter provision does prescribe notice to a surety before entry of judgment against the surety.[5] Moreover, as the court of appeals explained, notice to the surety of the principal's breach should not be required because "[b]y contracting to act as surety [petitioner] undertook contractual obligations to insure the presence of its principals at trial. [Petitioner] therefore had a duty to remain apprised of the whereabouts of its principals. [*United States* v.] *Vera-Estrada*, 577 F.2d [598, 600 (9th Cir. 1978)]; *United States v. Marquez*, 564 F.2d 379, 380 (10th Cir. 1977); *United States v. Payne*, 272 F. Supp. 939, 941 (D. Conn. 1967). Had [petitioner] fulfilled its contractual duties, it would have had actual notice that its principals failed to appear" (Pet. App. A5).

2. The court of appeals was not obligated to incorporate a state law notice requirement into the Federal Rules of Criminal Procedure. As the court below found (Pet. App. A5), Rule 46 is quite clear — notice of a defendant's failure to appear need not be given the surety. Additionally, the bond and accompanying documents filed with the district

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[5]Thus, petitioner's suggestion (Pet. 11) that bail bond forfeitures are accomplished without "some form of notice and a hearing" is incorrect. Nor does petitioner dispute the fact that it received notice before judgment was executed against it: petitioner's complaint is solely that the notice was given too late for it to recover the defendants and be entitled (in its view) to exoneration.

court make plain that petitioner understood that, should the defendants fail to appear, the bail would immediately be forfeited. Accordingly, there is no need to apply state law as either a term of the federal contract or a guide to its interpretation.

Thus, there is no reason for this Court to consider petitioner's claim (Pet. 8-9) of conflict among the circuits on the question whether federal bail contracts need be interpreted in accordance with state or federal law. None of the cases cited by petitioner holds that state procedural requirements are entitled to preference over the Federal Rules of Criminal Procedure where, as in this case, both address the same problem.[6] Moreover, as this Court recognized in *United*

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[6]In any event, the conflict cited by petitioner is more apparent than real. Although courts in three circuits have stated that federal bail bonds should be interpreted in light of state substantive law (*United States* v. *D'Anna*, 487 F.2d 899 (6th Cir. 1973); *United States* v. *Gonware*, 415 F.2d 82 (9th Cir. 1969); *Palermo* v. *United States*, 61 F.2d 138 (8th Cir. 1932), cert. denied, 288 U.S. 600 (1933)), those cases all rely on a repealed federal statute that required federal arrest and bail practices to conform to state law. *United States* v. *Carr*, 608 F.2d 886, 887 n.1 (1st Cir. 1979); *United States* v. *Miller*, 539 F.2d 445, 447 (5th Cir. 1976). At the time *Palermo* v. *United States*, *supra*, was decided, for example, a federal statute provided that the "conditions of a bail bond given in United States courts are generally governed by the laws of the state in which the court is located" (61 F.2d at 140, citing Act of Sept. 24, 1789, (ch. 20, Section 33, 1 Stat. 91), (formerly codified at 18 U.S.C. (1946 ed.) 591) (repealed 1948)). The Ninth Circuit in *United States* v. *Gonware*, *supra*, 415 F.2d at 83, simply cited *Palermo* v. *United States*, *supra*, and other early cases relying on former 18 U.S.C. 591 for its conclusion that state law governs the construction of federal bail bonds. The Sixth Circuit similarly cited *Gonware* and *Palermo* for its identical conclusion. *United States* v. *D'Anna*, *supra*, 487 F.2d at 900. As has been recently noted by the First, Second and Fifth Circuits, however, this approach is erroneous. *United States* v. *Carr*, *supra*, 608 F.2d at 887; *United States* v. *Catino*, 562 F.2d 1, 2 (2d Cir. 1977); *United States* v. *Miller*, *supra*, 539 F.2d at 447. There is no longer a statutory direction to interpet federal bail bonds in light of state law. Procedures and conditions for admission to bail in the federal courts and for revocation and modification of bail are now extensively

States v. *Seckinger*, 397 U.S. 203, 209 n.12 (1970), "the validity and construction of contracts [by] the United States * * * present questions of federal law not controlled by the law of any State." In this instance, the contract is purely a federal one implicating only federal interests. Consequently, it is irrelevant that the federal rule relating to notice of default on a federal bond is different from California's statutory requirement for notice of state bond defaults. See *United States* v. *Catino*, 562 F.2d 1 (2d Cir. 1977). Cf. *United States* v. *Gillock*, 445 U.S. 360, 368 (1980).

3. Contrary to petitioner's claim (Pet. 9-10), the decision below does not conflict with other cases requiring notice to a surety when its risk has been significantly increased. See *United States* v. *D'Anna*, 487 F.2d 899, 901 (6th Cir. 1973); *United States* v. *Egan*, 394 F.2d 262, 267 (2d Cir.), cert. denied, 393 U.S. 838 (1968). Those decisions involve instances of a material change in circumstances before the defendant has fled. In *D'Anna*, for example, the court continued bond without notice to the surety for a period of time after

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governed by the Bail Reform Act of 1966, 18 U.S.C. 3141 *et seq.* Forfeiture and exoneration are controlled by subsections (e) and (f) of Rule 46, Fed. R. Crim. P. "In view of the pervasive federal regulation of federal bail procedures and conditions, we believe that the interpretation of bail contracts to which the government is a party is and should be controlled by federal common law." *United States* v. *Miller*, *supra*, 539 F.2d at 447 n.2. Thus, to the extent that there is any conflict on the issue whether state or federal law governs the construction of federal bail bonds, the conflict is not significant inasmuch as the legal error that lies at the center of the conflict is apparent. Indeed, the Ninth Circuit recently revisited the question of whether state or federal law governs the construction of federal bail bonds, and, based on the Second and Fifth Circuits' reasoning in *Catino* and *Miller*, concluded that its earlier statement in *Gonware* was "dictum" that "is not controlling." *United States* v. *Vera-Estrada*, 577 F.2d 598, 599 (9th Cir. 1978). Moreover, the cases holding that federal bail bonds should be interpreted in light of state substantive law do not suggest that state procedural requirements, such as the notice issue in this case, should prevail over federal procedural rules. See, e.g., *United States* v. *D'Anna*, *supra*, 487 F.2d at 901.

sentencing to allow the defendant to arrange his affairs, during which period the risk of flight was clearly more pronounced. Such pre-flight notice of changed conditions thus is designed to help the surety both to protect his interest and produce the defendant. Once the defendant fails to appear, however, the "risk of flight" has matured into the certainty of flight, and the rationale for pre-flight notice no longer applies.

4. The remaining claims raised by petitioner are equally meritless. Whatever vagueness challenges may be made to Fed. R. Crim. P. 46(f), which provides for exoneration in the event of a "timely surrender" of the defendant, they clearly do not apply here. See Pet. App. A4. One defendant has not yet been recovered since his flight in September 1979; even if he were to appear tomorrow, his surrender would not be "timely" under any reasonable interpretation. And although the other defendant voluntarily surrendered two months after his bond was forfeited, petitioner never argued timeliness of the surrender to the district court as a ground for total or partial exoneration. Thus, assuming *arguendo* that Rule 46(f) is vague in marginal fact situations (*United States* v. *Powell*, 423 U.S. 87, 93 (1975)), petitioner is in no position to challenge as vague the rule's application in these cases.

Nor is a bail bond contract between the government and a surety an impermissible contract of adhesion that requires the surety to waive its constitutional right to notice. As the court below found (Pet. App. A6), "[petitioner] freely undertook the obligation to pay its principals' bonds in the event they failed to appear at trial. It cannot now reasonably contend that this obligation was forced upon it by the Government." See also *D.H. Overmyer Co.* v. *Frick Co.*, 405 U.S. 174 (1972) (a cognovit clause permitting judgment without notice is not necessarily unconstitutional).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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